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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:
SOUTH EDGE, LLC,
Debtor.

Chapter 11

Case No. BK-10-32968 (BAM)

**MOTION FOR INTERIM AND FINAL
ORDERS (1) AUTHORIZING CHAPTER
11 TRUSTEE TO OBTAIN SENIOR
PRIMING SECURED POSTPETITION
FINANCING; (2) AUTHORIZING THE
USE OF CASH COLLATERAL; AND (3)
SCHEDULING A FINAL HEARING**

Interim Hearing

Date: July 20, 2011
Hearing Time: 9:30 a.m.
Courtroom: Courtroom #3
Foley Federal Building
300 Las Vegas Boulevard
Las Vegas, Nevada 89101

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1 TO THE HONORABLE BRUCE A. MARKELL, UNITED STATES BANKRUPTCY JUDGE:

2 Cynthia Nelson, the chapter 11 trustee (the “Trustee”) in the chapter 11
 3 bankruptcy case (the “Chapter 11 Case”) of South Edge, LLC (“South Edge” or the “Debtor”),
 4 hereby submits this motion (“Motion”) for entry of an interim order (the “Interim Order”) and a
 5 final order (the “Final Order”) pursuant to, *inter alia*, sections 105(a), 361, 362, 363, 364(c)(1)
 6 and (d)(1) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the
 7 “Bankruptcy Code”) and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy
 8 Procedure (the “Bankruptcy Rules”), (1) authorizing and approving the Trustee to obtain
 9 postpetition financing on a priming lien basis in an aggregate principal amount of up to \$21.4
 10 million and with an initial, interim borrowing limit of \$4.0 million (the “TIP Facility”) pursuant
 11 to a Trustee Financing Agreement (the “TIP Loan Agreement,” or “TLA”, and together with any
 12 related documents required to be delivered by or in connection with the TIP Loan Agreement,
 13 the “TIP Loan Documents”), by and among the Trustee, solely in her capacity as the Trustee of
 14 South Edge, on behalf of its bankruptcy estate (the “Estate”), as Borrower, and certain affiliates of the
 15 Settling Builders (as defined below), as Lenders (the “Builder Lenders”), (2) authorizing the use
 16 of the TIP Facility loan proceeds and of the LID Proceeds (as defined below), the latter of which
 17 are the cash collateral of the Prepetition Lenders (as defined below), to pay for the administrative
 18 expenses of the Trustee and the Estate and to repay borrowings under the TIP Facility, and (3)
 19 finding that the creditors with an interest in the LID Proceeds and the Debtor’s cash have been
 20 furnished with adequate protection. The TIP Loan Agreement will be substantially in the form
 21 attached as Exhibit 1 to the Declaration of Cynthia Nelson (“Nelson Decl.”) filed in support
 22 hereof.

23 Unless otherwise stated herein, capitalized terms that are not otherwise defined
 24 herein or in the Legal Memorandum attached hereto shall have the meanings ascribed to them in
 25 the Interim Order and the TIP Loan Agreement, as applicable.

STATEMENT PURSUANT TO LR 4001¹

In accordance with Bankruptcy Rule 4001(c), the following is a “concise statement” of the specific relief the Trustee is seeking with respect to the TIP Facility, and the location within the Interim Order and the TIP Loan Agreement of all material provisions therein:

- 1. Maturity Date/Termination:** The TIP Facility will mature on the earliest of: (a) the termination of the Plan Support Agreement; (b) the Trustee's Consent Termination; (c) the effective date of the Plan of Reorganization; (d) termination and acceleration of the Loans pursuant to Section 10.1 following a Default; or (e) November 30, 2011 (provided, however, that in the case of "e" only, the Maturity Date shall be extended by such additional time, if any, as is permitted for a plan effective date under Section 3(d) of the Plan Support Agreement, provided that a Budget that is acceptable to the Trustee, the Agent, and the Builder Lenders is agreed to in connection with such extension). TLA, § 1.1.
 - 2. Interest Rate:** 0%, unless a Default occurs, at which time interest will accrue and be payable at the Default Rate equal to the prime rate (as quoted in the Wall Street Journal), plus five percent. TLA, § 2.2(a) and (b).
 - 3. Loan Amount:** The initial loan to be made following the Interim Closing Date shall not exceed \$4.0 million. Upon and after the Final Closing Date, the total borrowings under the loan shall not exceed \$21.4 million at any point in time during the term of the TIP Loan Agreement. Furthermore, loans outstanding may not exceed an amount equal to the aggregate of (x) the next applicable weekly "Ending Balance – TIP Loan" on the Budget, plus (y) any revenue or receipt projected through such applicable weekly "Ending Balance – TIP Loan" on the Budget that has not been received by the Trustee, less (z) any expense projected through such applicable weekly ending balance. TLA, § 2.1(b); Interim Order, ¶ 2(b)
 - 4. Events of Default:** Subject to any applicable cure rights, any (i) payment default, (ii) failure to perform or comply with material terms, conditions, covenants, or other agreement in the TIP Loan Documents, (iii) representation or warranty of the Trustee that proves untrue; (iv) conversion of the Chapter 11 Case to a bankruptcy case under chapter 7, (v) action by the Trustee that is inconsistent with the Trustee's Consent, (vi) dismissal of the Chapter 11 Case, and (vii) revocation, reversal, modification, stay or vacation of the Financing Orders to which the Builder Lenders have not consented in writing. TLA, § 9.
 - 5. Liens:** All Obligations under the TIP Facility are to be secured by first priority priming liens in favor of the Builder Lenders on the Collateral, which will consist of any and all rights and interests of the Estate in and to payments or reimbursements from LID Proceeds (as defined below) that have been paid to the Estate or that will become payable to the Estate in connection with the construction and/or completion of improvements relating to Local Improvement

¹ Unless otherwise stated, capitalized terms used in this summary shall have the meanings ascribed to them in the TIP Loan Agreement.

District T-18 ("LID T-18") segments relating to the Project, and proceeds, products, offspring, and profits thereof (including cash). The Builder Lenders' liens will be senior to all other liens, encumbrances and other interests in the Collateral pursuant to Bankruptcy Code section 364(d)(1), including, but not limited to, those of the Agent, except for Permitted Liens that are valid, perfected, unavoidable and not subject to subordination. TLA, §§ 4.1, 4.2; Interim Order, ¶ 2(c) and (e).

6. **Superpriority Claims:** All Obligations under the TIP Facility shall constitute an administrative expense claim against the Estate having priority over any and all other administrative expenses of the kind specified in Bankruptcy Code sections 503(b) or 507(b) (including any post-conversion expenses with a priority under Bankruptcy Code section 726(b)). ("Superpriority Claim"). TLA, § 3; Interim Order, ¶ 2(h).
7. **Conditions to Loans:** The following are conditions precedent to the Builder Lenders' obligations to make any Loan: (i) for the initial interim borrowing, the entry of the Interim Financing Order that is acceptable to the Builder Lenders and the Agent, is in full force and effect, and contains findings and protections under section 364(e) of the Bankruptcy Code; (ii) delivery the Builder Lenders of executed documents evidencing the TIP Loan Agreement to ; (iii) timely delivery to Builder Lenders of Notice of Borrowing; (iv) no Defaults; (v) the Maturity Date has not occurred; and (vi) the Final Order, which has been approved by the Builder Lenders and Agent, has been entered by no later than August 12, 2011, is in full force and effect, shall not have been stayed, revoked, reversed, modified, or amended in any respect, and contains findings and protections under section 364(e) of the Bankruptcy Code. TLA, § 5.1; Interim Order, ¶ 2(g).
8. **Automatic Stay/Modification:** Upon a Default, the Builder Lenders may set an expedited hearing for relief from the automatic stay on not less than three Business Days' notice. At such hearing the only issues will be (i) whether an uncured Default exists, and (ii) whether the Court may impose any condition on the exercise of the Builder Lenders' remedies, so long as such condition does not impair the Builder Lenders' exercise of remedies for more than 30 days and does not otherwise impair their interests in the Collateral. The Builder Lenders shall be granted relief from stay if an uncured Default is found to exist to the extent necessary to permit the Builder Lenders to exercise their rights and to effectuate the provisions of the TIP Loan Agreement and the Financing Orders, without further notice, application to or order of the Court. TLA, §§ 10.2. and 10.3; Interim Order, ¶ 5(c) and (d)
9. **Modification of Nonbankruptcy Law Relating to Lien Perfection.** The Builder Lenders' and the Agent's liens on the Collateral shall be deemed perfected with no need for the Trustee to execute any additional documents or of recordation. TLA, § 4.3; Interim Order, ¶ 3
10. **Cooperation:** Subject to the execution of reasonable confidentiality agreements and/or common interest agreements, the Trustee has agreed to consult with the Builder Lenders and the Agent regarding her administration of the Estate. The Trustee will make non-privileged documentation and information regarding the Project available to the Builder Lenders and the Agent on reasonable notice. TLA, § 7.4.
11. **Negative Covenants:** Among other covenants, the Trustee has agreed that, except upon the occurrence of the Maturity Date (other than as a result of the

1 effective date of the Plan of Reorganization), the Trustee, without consent of
 2 the Builder Lenders, will not (i) approve, file, support or consent to (a) a plan
 3 other than the Plan of Reorganization, (b) a sale or compromise of material
 4 assets, (c) the allowance of any claim in excess of \$25,000, other than such
 5 claims as appear in the Schedules of Assets and Liabilities of South Edge
 6 previously filed by the Trustee that were not scheduled as disputed, contingent
 7 or unliquidated, and for which no proof of claim was filed, (d) enter into a
 8 contract with a total cost to the Estate in excess of \$25,000 (provided,
 9 however, that if the contract relates to an expenditure set forth in the Budget,
 10 and if each of the Builder Lenders is given an equal opportunity to bid on the
 11 contract, and either (x) all Builder Lenders choose not to bid, or (y) none of
 12 the bids by any Builder Lender is the lowest bid, then written consent from the
 13 Builder Lenders shall not be required if such contract is commercially
 14 reasonable), (e) material amendments to plans or permits, provided, however,
 15 that with respect to sub-parts (c) and (e) above, the Agent's consent shall also
 16 be required; (ii) pursue litigation or other claims against the Builder Lenders
 17 or their affiliates, and (iii) unless the Trustee's Consent has terminated in
 18 accordance with its provisions, take actions inconsistent with the Trustee's
 19 Consent. However, in no event shall funds advanced by the Builder Lenders
 20 be used to fund the pursuit or investigation of any claims against the Builder
 21 Lenders, the Settling Builders, or their insiders or affiliates, or to oppose the
 22 Plan of Reorganization. TLA, §§ 8, 8.5, 8.6, 8.7.

12. **Fee Advances:** Pursuant to Section 15 of the Trustee's Consent and Section
 13 2.7 of the TIP Loan Agreement, notwithstanding the occurrence of the
 14 Maturity Date (other than as a result of the effective date of the Plan of
 15 Reorganization), the Builder Lenders remain obligated to fund the payment of
 16 all accrued and unpaid administrative expenses of the Trustee and the Estate
 17 as of the date of such termination, as set forth in the Budget; provided,
 18 however, that the allowed fees and expenses of the Trustee and the Trustee's
 19 professionals shall not exceed the unpaid fees and expenses for the full Budget
 20 period. TLA, § 2.7.
21. **Fiduciary Duties:** Nothing in the Trustee's Consent or the Plan Support
 22 Agreement prohibits the Trustee's exercise of her fiduciary or statutory duties
 23 in the Chapter 11 Case. However, if, in the exercise of those duties, a
 24 Trustee's Consent Termination occurs under the TIP Loan Agreement, then
 25 the Maturity Date under the TIP Facility will immediately occur and, upon
 26 notice by the Builder Lenders to the Trustee, the Obligations under the TIP
 27 Facility will become immediately due and owing. See Trustee's Consent § 13
 28 and final sentence; TLA, §§ 1.1 (definitions of "Maturity Date" and "Trustee's
 Consent Termination") and 10.1.
29. **Deadlines re Disclosure Statement and Plan:** While the Plan Support
 30 Agreement to which the Trustee's Consent applies, as modified and
 31 conditioned by that Consent, the TIP Facility is not expressly tied to any
 32 disclosure statement or plan deadlines. Indeed, pursuant to the Trustee's
 33 Consent, the Trustee will not propose a plan. However, the November 30,
 34 2011 Maturity Date of the TIP Facility is tied to the outside date of the
 35 anticipated effective date of the Plan of Reorganization to be proposed jointly
 36 by the Settling Builders and the Agent (unless extended by consent for up to
 37 an additional 30 days).
38. **Indemnifications:** The TIP Loan Agreement does not provide for the
 39 Estate's indemnification of any party.

1 16. **Releases:** The TIP Loan Agreement does not provide for the release or waiver
 2 of any claim of the Estate.

3 The identity of each provision above to remain in effect if the Interim Financing
 4 is granted but the Final Financing is denied, is as follows: All of the above.

5 In accordance with Bankruptcy Rule 4001(b), the following is a “concise
 6 statement” of the specific relief the Trustee is seeking to the extent of the Agent’s interest in the
 7 Collateral, and the location within the Interim Order and the TIP Loan Agreement of all material
 8 provisions therein:

- 9 1. **Entities With an Interest in the Collateral:** The Agent (for the benefit of the
 10 Prepetition Lenders).
- 11 2. **Purpose of Loan/Use of Collateral:** Subject to the terms of the TIP Facility,
 12 the Loan will be used, consistent with the Budget, to fund, among other items,
 13 (i) operating disbursements on account of, among other items, the further
 14 construction of infrastructure segments of the Project, Project maintenance,
 15 Project security, surety bond obligations, and the administration of LID T-18
 16 reimbursements, (ii) LID T-18 bond assessments and property taxes, and (iii)
 17 bankruptcy-related disbursements, including United States Trustee’s fees and
 18 the fees and expenses of the Trustee, her professionals, and the Agent’s
 19 professionals. *See TLA, Recitals.*
- 20 3. **Material Terms of Collateral Use:** Use of Collateral will only be subject to
 21 the terms of TIP Loan Agreement (as summarized above) for the term of the
 22 TIP Loan Agreement.
- 23 4. **Adequate Protection:** The Agent will be granted as adequate protection for
 24 any diminution in the value of the Agent’s interest in the Collateral resulting
 25 from the use of the Collateral and the imposition of the automatic stay (the
 26 “Adequate Protection Obligations”)
 - 27 a. a second-priority liens in the Collateral subject only to the Builders
 28 Lenders’ first-priority liens on the Collateral; TLA, § 4.2; Interim Order, ¶
 29 2(d)
 - 30 b. a first priority lien in all other assets of the Estate; TIP Loan Agreement,
 31 subject only to Permitted Liens (as defined in the Cash Collateral
 32 Stipulation) and excluding avoidance actions or the proceeds thereof, § 4.2;
 33 Interim Order, ¶ 2(d)
 - 34 c. an allowed superpriority administrative expense claim as provided for under
 35 section 507(b) of the Bankruptcy Code on account of the Adequate
 36 Protection Obligations, which shall be junior only to the Superpriority
 37 Claim of the Builder Lenders; Interim Order, ¶ 2(d)

27 The identity of each provision above to remain in effect if the Interim Financing
 28 is granted but the Final Financing is denied, is as follows: All of the above.

PRELIMINARY STATEMENT

The TIP Facility has been made possible by a settlement (the “Settlement”) reached only recently among KB Home Nevada, Inc., Coleman-Toll Limited Partnership, Pardee Homes of Nevada, and Beazer Homes Holdings Corp., and their respective parent guarantors (collectively, the “Settling Builders”), on the one hand, and JPMorgan Chase Bank, N.A. (“JPMorgan” or “Agent”), as Agent under the Debtor’s prepetition credit agreement (the “Credit Agreement”), and a supermajority of the lenders under the Credit Agreement (the “Consenting Lenders” and, collectively with the Agent and the Settling Builders, the “Settling Parties”).

The Settlement is to be implemented through a chapter 11 plan of reorganization that is to be jointly proposed by the Settling Parties. A redacted, but otherwise true and correct, copy of the letter agreement, incorporating a term sheet attached thereto (the "Plan Term Sheet") that embodies the Settlement and sets forth the basic terms of a plan of reorganization based thereon (the "Plan of Reorganization"), is attached as Exhibit 2 to the Nelson Decl. (the "Plan Support Agreement").

The Trustee is not a party to the Plan Support Agreement and will not be a proponent of the Plan of Reorganization.² However, the effectiveness of the Plan Support Agreement was conditioned upon the Trustee's consent to the provisions of the Plan Support Agreement. The Trustee was, and remains, supportive of the process by which the Agent and the Settling Builders will be seeking confirmation of the Plan of Reorganization, but was not in a position to execute the form of consent initially proposed by the Settling Parties. While the Agent determined to waive the requirement for the Trustee's consent, the Trustee successfully negotiated with the Settling Builders a qualified and conditioned form of consent by which the Settling Builders agreed to certain matters not addressed in the Plan Support Agreement and pursuant to which the Trustee will be supporting confirmation of the Plan of Reorganization.

² As such, the Trustee need not and is not by this Motion seeking approval of the Plan Support Agreement.

1 accepted by the Settling Builders on June 8, 2011, a true and correct copy of which is attached as
 2 Exhibit 3 to the Nelson Decl. (the “Trustee’s Consent”).

3 The TIP Facility is an essential element to the Settlement and is critical to the
 4 Trustee’s ability to administer the Estate. Although the Estate owns assets of substantial value,
 5 those assets are not particularly liquid and, in certain instances, are the subject of active disputes
 6 or potential disputes that will require resolution through consent or litigation. The TIP Facility
 7 provides the Trustee and the Estate with access to funds necessary to pay through the end of
 8 November 2011 (i) operating disbursements on account of, among other items, further
 9 construction of and completion of requirements with respect to certain infrastructure segments of
 10 the Project, Project maintenance, Project security, the Estate’s surety bond and insurance
 11 obligations, and the administration of LID Proceeds, (ii) LID T-18 bond assessments and
 12 property taxes, and (iii) bankruptcy-related disbursements, including United States Trustee’s fees
 13 and the fees and expenses of the Trustee, her professionals, and the Agent’s and Prepetition
 14 Lenders’ professionals.

15 Significantly, the Plan Support Agreement (and, hence, the TIP Facility), has the
 16 support of the Consenting Lenders, who collectively hold more than 92% in dollar amount of the
 17 Prepetition Loans and represent more than 94% in number of the Prepetition Lenders.

18 The TIP Facility is critical to the implementation of the Settlement, and is
 19 intended to bridge the Estate to a near-term exit from this Chapter 11 Case through a confirmed
 20 plan of reorganization that will have the consent of the Estate’s largest creditor group and a
 21 super-majority of the equity constituents in the Chapter 11 Case, provide necessary consideration
 22 for the fair and appropriate treatment of all other constituencies, resolve protracted and expensive
 23 litigation, and get the Project back on track after languishing to the detriment of the City of
 24 Henderson and other parties in interest over the past few years. The Trustee believes the TIP
 25 Facility is in the best interests of the Estate and should be approved by the Court.

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28

LEGAL MEMORANDUM³

I.

Jurisdiction and Venue

This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

II.

Background

A. Commencement of Chapter 11 Case and Appointment of Trustee

On December 9, 2010, certain of the Prepetition Lenders commenced an involuntary chapter 11 bankruptcy petition (the “Involuntary Petition”) against the Debtor. In connection with the Involuntary Petition, the Agent filed the *Motion for Appointment of an Interim and Permanent Chapter 11 Trustee for South Edge, LLC (I) During the “Gap” Period and (II) on a Permanent Basis* [Docket No. 7] (the “Trustee Motion”).⁴

On February 3, 2011, following a contested trial on the Involuntary Petition, the Court entered an order for relief under chapter 11 of the Bankruptcy Code against the Debtor [Docket No. 400] and issued an order directing the appointment of a chapter 11 trustee [Docket No. 401]. On February 20, 2011, the Office of the United States Trustee (the “UST”) designated the Trustee to serve as trustee for the estate of South Edge, LLC. [Docket No. 441] and on February 23, 2011, the Court entered an order approving the appointment of the Trustee as chapter 11 trustee for the Debtor (the “Appointment Order”) [Docket No. 449].

³ Unless otherwise stated, capitalized terms used in this Legal Memorandum shall have the meanings ascribed to them in the Motion.

⁴ As the Court is well aware, the Involuntary Petition and the Trustee Motion were filed after two years of disputes and litigation among the Builder Members (defined below) and between the Members and the Agent. The Trustee will not repeat the facts that lead to the commencement of the Chapter 11 Case.

1 **B. The Debtor, It's Primary Assets and Economic Stakeholders**

2 The Debtor is a special-purpose, limited liability company that owns the real
 3 estate development project known as Inspirada (the “Project”), which, at the start of its
 4 development encompassed nearly 2,000 acres. The Project was designed as a joint venture of
 5 builders who are South Edge’s members (the “Builder Members”) for the purpose of pooling
 6 their resources to acquire raw land and build common infrastructure on a cost-effective basis
 7 with (1) \$585 million in loans pursuant to the Credit Agreement, (2) \$102 million in LID T-18
 8 bonds (“LID Proceeds”), and (3) capital contributions from the Builder Members.

9 In addition to the real estate and personal property assets that comprise the
 10 Project, the Debtor’s primary assets include, among others, (i) approximately \$900,000 in cash,
 11 of which, approximately \$400,000 is encumbered by the Agent’s liens, and approximately
 12 \$500,000 is unencumbered, but subject to alleged interests asserted by certain of the Builder
 13 Members, (ii) an alleged ownership interest in more than \$26 million in cash (the “Disputed MI
 14 Deposit”) that is currently maintained in the name of Focus South Group, LLC (“Focus”) in an
 15 account at JPMorgan, and related claims against Focus and Holdings Manager, LLC (“Focus
 16 Manager”), an affiliate of Focus which is the former General Manager of South Edge
 17 (collectively, the “Focus Claims”); (iii) the right to realize the LID Proceeds; and (iv) claims
 18 against equity members of the Debtor other than Focus under a range of legal theories.

19 **1. The Builder Members**

20 The Builder Members originally were comprised of each of KB Home Nevada,
 21 Inc., Coleman-Toll Limited Partnership, Pardee Homes of Nevada, Beazer Homes Holdings
 22 Corp., Meritage Homes of Nevada (“Meritage”), Focus, Alameda Investments, LLC
 23 (“Alameda”), and Kimball Hill Homes Nevada, Inc. (“Kimball Hill”). In April 2008, Kimball
 24 Hill filed for bankruptcy protection. In January 2009, Alameda did the same. The Trustee
 25 understands that each of Kimball Hill and Alameda purported to reject the operating agreement
 26 of the Debtor (as amended, modified and supplemented from time to time, the “Operating
 27 Agreement”), in its respective bankruptcy case.

1 As the sole owners of the Debtor, the Builder Members managed the Debtor's
 2 affairs largely through a management committee (the "Management Committee") comprised of
 3 committee members appointed by each of the Builder Members. Among other powers, the
 4 Management Committee established the business plan for the Debtor, approved all of the
 5 Debtor's material contracts, approved actions relating to enforcement of remedies against
 6 Members for failure to fund capital contributions, approved master plan documents, and
 7 determined the amount of capital contributions required of each Builder Member from time to
 8 time.⁵

9 **2. The Agent and Prepetition Lenders**

10 As briefly referenced above, to partially finance the purchase and development of
 11 the Project, pursuant to the Credit Agreement the Debtor took out loans ("Prepetition Loans")
 12 which, in the aggregate, totaled \$585,000,000 in principal amount. JPMorgan is the Agent under
 13 the Credit Agreement and is also a lender thereunder (hereafter, lenders under the Credit
 14 Agreement shall be referred to collectively as the "Prepetition Lenders").

15 As security for the Prepetition Loans, the Agent and the Prepetition Lenders
 16 obtained liens on all of the Debtor's land and related collateral, including its right to receive LID
 17 Proceeds held by the City of Henderson.⁶ The Agent asserts that the Debtor's outstanding
 18 indebtedness to the Agent and the Prepetition Lenders presently amounts to approximately \$382
 19 million, an amount the Trustee has acknowledged in the Trustee's Consent to be owing solely for
 20 purposes of the Plan Support Agreement, the Plan Term Sheet and the Plan of Reorganization,
 21 with a full reservation of the Trustee's rights. Without question, however, the claims of the
 22 Agent and the Prepetition Lenders represent the lion's share of the debt in this Chapter 11 Case.

23
 24
 25 ⁵ Holdings Manager LLC, an affiliate of Builder Member Focus, was the Debtor's "General Manager." Holdings Manager was responsible for conducting, in the name of and on behalf of the Debtor, the day-to-day operations of the Debtor. Another affiliate of Focus, Landtek, LLC, was engaged as construction manager for the Project.

26
 27 ⁶ See *Third Stipulation Extending Trustee's Authorization To Use Cash Collateral* (the "Third Extension Stipulation"), which is attached to the *Notice of Stipulation Extending Trustee's Authorization To Use Cash Collateral* [Docket No. 766] filed with the Court on June 30, 2011.

1 **C. Status of Project**

2 Until the Trustee's appointment, no substantive work had taken place on the
 3 Project since the spring of 2008. The cessation in work was due, among other reasons, to
 4 disputes among (i) certain of the Builder Members and Focus and (ii) the Builder Members and
 5 the Agent. Those disputes precipitated a decision-making gridlock and funding shortfalls that,
 6 ultimately, led to complex multi-party litigation and the commencement of this Chapter 11 Case.

7 **D. Recovery of LID Proceeds**

8 As suggested above, the Project, by design, is to be partially financed by LID
 9 Proceeds. In April 2006, the City of Henderson (the "City") raised approximately \$102 million
 10 by issuing T-18 Local Improvement District (Inspirada) Limited bonds ("LID Bonds") to
 11 purchase from South Edge, as developer, certain roads and other public infrastructure (including,
 12 among such other infrastructure, parks, utilities, drainage systems, and sewer and water and
 13 storm drain pipelines) after they were built by the Debtor.

14 LID Proceeds are disbursed by the City in increments that relate to the ongoing
 15 completion of the infrastructure build-out of the Project. Most LID Proceeds have not been paid
 16 to South Edge or its Estate because the related infrastructure construction in LID T-18 has not
 17 been completed. As of the date hereof, approximately \$89.7 million in LID Proceeds remain
 18 undisbursed. Certain of those projects, however, *are* substantially complete, requiring only
 19 incremental additional work to reach completion. If the Trustee is able to complete such
 20 improvements and otherwise fulfill the conditions precedent to recovering the LID Proceeds, the
 21 Estate will be able to recover approximately \$34.1 million in LID Proceeds,⁷ at an actual cost to
 22 complete of approximately \$6.2 million.

23
 24
 25 ⁷ Although approximately \$34.1 million in LID Proceeds is available for recovery, the actual amount of
 26 LID Proceeds that the Trustee anticipates she will be able to recover during the term of the TIP Loan
 27 Agreement is approximately \$20.8 million. The Trustee projects that the remaining balance of the
 28 recoverable LID Proceeds will be recoverable after the Maturity Date. Any reference herein to the
 "Estate" in the context of the recovery of approximately \$34.1 million in LID Proceeds should be read to
 mean the "Estate and/or any successor to the Estate."

1 The Trustee intends to use the TIP Facility to fund the completion of those
 2 already substantially completed LID segments that will entitle the Estate to recover LID
 3 Proceeds in amounts significantly in excess of the actual cost of completion.

4 **E. Prior Short Term Advance and Use of Cash Collateral**

5 On April 8, 2011, the Court entered an order [Docket No. 568] approving on an
 6 interim basis that certain *Stipulation Providing For Post-Petition Financing and Use of Cash*
 7 *Collateral* (as subsequently amended to, among other things, address concerns of the Builder
 8 Members, the “Cash Collateral Stipulation”). Pursuant to that order, the Court authorized the
 9 Trustee’s (i) receipt of a short term advance of approximately \$500,000 sourced from the
 10 Disputed MI Deposit, and (ii) subject to the entry of a final order, use of cash collateral through
 11 April 29, 2011. The proceeds of the short-term advance were used to pay outstanding LID
 12 assessments due in the month of April. Following payment of those assessments, the Estate
 13 became eligible to recover, and did in fact recover, LID Proceeds from the City of approximately
 14 \$1 million from which the Trustee repaid the funds advanced from the Disputed MI Deposit.
 15 The Cash Collateral Stipulation was approved by the Court on a final basis by order entered on
 16 April 21, 2011 [Docket No. 624]. Thereafter, the Trustee and Agent have entered into three
 17 stipulations extending the period during which the Trustee may use cash collateral. The Trustee
 18 currently is authorized to use the cash collateral remaining from the LID Proceeds recovered
 19 from the City through July 1, 2011, and has obtained the Agent’s consent to continue to utilize
 20 that cash collateral through July 29, 2011. *See* Third Extension Stipulation.

21 **F. The Settlement**

22 The early stages of this Chapter 11 Case were fraught with disputes and litigation
 23 among the Agent and the Builder Members regarding a myriad of issues, including, but not
 24 limited to, the involuntary commencement of this Chapter 11 Case, the appointment of the
 25 Trustee, and disparate views as to the direction the Trustee should take in reinvigorating and
 26 moving the Project forward and developing an exit from the Chapter 11 Case. As a consequence
 27 of these disputes and of the Estate’s need to recover assets that were not within the Trustee’s
 28

1 immediate possession, the Trustee and her professionals immediately commenced investigations
 2 of the Estate's rights and remedies against various parties, including the Estate's potential
 3 litigation claims against the Builder Members and the Trustee's claims against Focus for
 4 turnover of documents and the Disputed MI Deposit, and engaged in numerous discussions with
 5 the various constituencies to determine how best to recover value for the Estate and, ultimately,
 6 resolve this Chapter 11 Case. To that end, as recently as May 20, 2011, the Trustee commenced
 7 an adversary proceeding to recover on the Focus Claims.

8 In recent weeks, the Settling Builders⁸ and the Agent, on behalf of itself and the
 9 Prepetition Lenders, the key economic constituents of the Estate, negotiated the Plan Term Sheet
 10 and Plan Support Agreement so as to resolve their disputes and allow the Debtor the opportunity
 11 to make a timely exit from this Chapter 11 Case. Implementation of the Plan Support Agreement
 12 will depend upon the confirmation of what will be the jointly proposed chapter 11 Plan of
 13 Reorganization, the terms of which are generally described in the Plan Term Sheet. As the
 14 Consenting Lenders that are parties to the Plan Support Agreement hold more than 92% in dollar
 15 amount of the Prepetition Loans and represent more than 94% in number of the Prepetition
 16 Lenders, it reasonably may be concluded that the Plan Support Agreement has the overwhelming
 17 support of the largest creditor constituency in this Chapter 11 Case.

18 Although the Trustee is not a party to the Plan Support Agreement and will not be
 19 a proponent of the Plan, the effectiveness of the Plan Support Agreement was conditioned upon
 20 the Trustee's consenting to the provisions of the Plan Support Agreement. Plan Support
 21 Agreement, ¶2. On June 8, 2011, after considering the Plan Support Agreement and the
 22 pathway it creates for a timely exit from this Chapter 11 Case, the Trustee provided consent
 23 subject to the terms and provisions of the Trustee's Consent that was heavily negotiated between
 24 the Trustee and the Settling Builders. The Trustee's Consent makes clear that:

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⁸ The only Builder Members that are not party to the Settlement Agreement (other than Alameda and Kimball Hill, each of which filed for bankruptcy and rejected the Operating Agreement) are Focus and Meritage.

1 The Trustee's role in the Case shall not be circumscribed in any manner
 2 other than as agreed to by the Trustee in this Consent, nor shall any
 3 restriction on the services to be performed by the Trustee or her
 4 professionals, as reflected in the Budget, restrict her from performing her
 5 statutory duties, fulfilling her fiduciary duties, or complying with any
 6 order of the Bankruptcy Court or any other court having jurisdiction over
 7 the Case....

8 Trustee's Consent, ¶ 13.

9 **G. The TIP Facility**

10 A key component of the Plan Support Agreement is that the Settling Builders
 11 provide to the Trustee financing through an anticipated late-November effective date of the Plan
 12 that will provide a funding source for payment in full of already accrued and unpaid and
 13 anticipated allowed administrative expenses, fund the build-out of the Project's infrastructure
 14 (which will result in Estate recovery of a substantial portion of the LID Proceeds), and otherwise
 15 preserve the value of the Estate's assets. The TIP Facility and the Trustee's proposed use of the
 16 proceeds of the TIP Facility and of the LID Proceeds are intended to address the Settling
 17 Builders' financing obligations under the Plan Support Agreement.

18 The Builder Lenders are comprised of affiliates of each of the Settling Builders.
 19 As described at the outset of the Motion, pursuant and subject to the provisions of the TIP
 20 Facility:

21 1. the Builder Lenders will advance to the Trustee up to \$4.0 million
 22 following the entry of the Interim Financing Order and, following the entry of the Final
 23 Financing Order, up to a total of \$21.4 million through the Maturity Date of the TIP Facility;

24 2. the Trustee may use the advances to pay various expenses of
 25 administration and operation, consistent with the heavily negotiated Budget that the Trustee
 26 believes will be adequate to address the Estate's anticipated financial needs and which has been
 27 approved by both the Builder Lenders and the Agent,⁹ a copy of which is attached to the TIP
 28 Loan Agreement;

29 ⁹ The Agent's consent to the terms of the TIP Loan Agreement is conditional, and at this time there
 30 remain certain unresolved issues between the Settling Builders and the Agent in the Budget. Therefore,
 31 the Agent has reserved its right to withdraw its consent to the TIP Loan Agreement at any time before the
 32 start of the hearing on the Interim Order on July 20, 2011.

1 3. to the great benefit of the Estate and vastly favorable to prevailing market
 2 conditions for debtor-in-possession financing, unless a Default occurs under the TIP Loan
 3 Agreement the advances made under the TIP Facility will be interest free;

4 4. pursuant to § 364(d) of the Bankruptcy Code, the Builder Lenders will
 5 receive as security for the Obligations first priority priming liens on any and all existing or future
 6 LID Proceeds (their sole collateral), which liens, subject to certain Permitted Liens, will be
 7 senior to all other liens, encumbrances and security interests in the Collateral, including, but not
 8 limited to, those of the Agent;

9 5. the Builder Lenders will be granted a Superpriority Claim on account of
 10 all Obligations under the TIP Facility;

11 6. the Builder Lenders have agreed that the Trustee may use the advances
 12 received pursuant to the TIP Facility to fund the payment of the allowed fees and expenses of the
 13 Trustee and the Trustee's professionals;¹⁰ and

14 7. the Trustee has agreed that, until the Maturity Date (other than as a result
 15 of the effective date of a Plan of Reorganization), she will not take actions inconsistent with the
 16 Trustee's Consent, will not pursue litigation or claims against the Builder Lenders or Settling
 17 Builders, and, subject to the terms of the TIP Loan Agreement, absent the consent of the Builder
 18 Lenders, will not file, support or consent to a plan of reorganization other than the Plan of
 19 Reorganization, sell or compromise material Estate assets, allow or settle any claim in excess of
 20 \$25,000, enter into any contract with a cost to the Estate in excess of \$25,000 (other than a
 21 contract relating to an expenditure in the Budget if the Builder Lenders have been given an

22
 23 ¹⁰ The Budget does not constitute a cap on such fees and expenses upon confirmation of the Plan of
 24 Reorganization. It is a guide and limits in real time the amounts that will be available to pay the Trustee
 25 and the Trustee's professionals pursuant to the TIP Facility. If the allowed fees and expenses of the
 26 Trustee and the Trustee's professionals exceed the amounts identified in the Budget, such allowed fees
 27 and expenses will need to be paid in full pursuant to the Plan and the requirements of the Bankruptcy
 28 Code. If the Settlement Agreement is terminated, the Trustee's rights to be paid in full for any fees and
 expenses allowed through the date of termination in excess of the amounts in the Budget from the Agent's
 collateral are fully reserved. The inclusion of fees and expenses of the Trustee and her professionals in the
 Budget is without prejudice to the rights of all parties in the Chapter 11 Case with respect to timely
 objection to the allowance of such fees and expenses.

1 opportunity to bid on the contract), amend plans, permits or specifications for any improvements
 2 to South Edge's property or amend South Edge's Development Plan, its Acquisition Agreement
 3 with the City, or any other material agreements relating to the City of Henderson, the LID, or
 4 other governmental entities. In no event shall funds advanced by the Builder Lenders be used to
 5 fund the pursuit or investigation of any claims against the Builder Lenders, the Settling Builders,
 6 or their insiders or affiliates, or to oppose the Plan of Reorganization.

7 The TIP Facility does not require the Trustee to determine the validity,
 8 enforceability, priority or amount of any prepetition claim of the Builder Lenders, and the
 9 Trustee has reserved all her rights in that regard pursuant to the Stipulation Extending Deadline
 10 For Settling Builders To File Proofs Of Claim Or Interest [Docket Number 759]. Although the
 11 TIP Facility prohibits the pursuit of litigation or claims against the Builder Lenders through the
 12 Maturity Date, it does not release the Builder Lenders from any claims held by the Estate or,
 13 after the Maturity Date, prejudice in any way the Trustee's rights to assert such claims.

14 The TIP Facility will allow the Trustee to complete certain LID infrastructure
 15 projects which, in turn, will permit the Estate to realize reimbursements of approximately \$34.1
 16 million in LID Proceeds that would not otherwise be available to the Estate. Although the liens
 17 against the LID Proceeds to be granted to the Builder Lenders under the TIP Facility will prime
 18 the Agent's liens against the LID Proceeds, the Agent does not object to such priming and to the
 19 use of the LID Proceeds, subject to the Budget and the other terms and conditions of the TIP
 20 Loan Agreement. The Trustee contends that the Agent and the Prepetition Lenders are
 21 adequately protected by the TIP Facility and the Trustee's use of the LID Proceeds Collateral
 22 because, among other reasons, (i) to the extent of any diminution in the value of their collateral
 23 caused by the TIP Facility or the use of their Collateral and subject to the terms of the TIP Loan
 24 Agreement and Interim Order, they will be receiving (a) second in priority secured priming liens
 25 in the Collateral, and (b) first in priority secured priority priming liens against substantially all
 26 other assets of the Estate (but excluding avoidance actions and the proceeds thereof); (ii) the TIP
 27 Facility implements a settlement that, if successful, will result in the near-term satisfaction of the
 28 Estate's outstanding obligations on the Prepetition Loan through a consensual plan of

1 reorganization; (iii) the Trustee, as the sole authorized representative of the Estate, is the only
2 party capable of recovering the LID Proceeds; and (iv) the LID Proceeds that will be reimbursed
3 as a result of the Trustee's use of the advances under the TIP Facility are expected to exceed the
4 amounts that will be advanced (meaning that, after repayment of the Obligations to the Builder
5 Lenders, the Estate would hold several million dollars of cash that it does not now hold and that,
6 but for the TIP Facility, would not be recoverable). Consequently, the TIP Facility places the
7 Agent and Prepetition Lenders at little risk while offering them significant upside.

The Trustee has no present source of significant financing or liquidity other than the TIP Facility. Absent such a source, the Estate very likely would be rendered administratively insolvent, the partially and yet-to-be completed major Project infrastructure would remain partially or completely unfinished, unpaid property taxes and LID assessments would accrue as senior liens against the Project, the value of Estate's property would be significantly impaired, the Trustee would have to rely on the Bankruptcy Court Section 506(c) surcharge rights granted and preserved under the Cash Collateral Stipulation to address accrued and unpaid Trustee and professional fees, the Trustee may be required to convert the Chapter 11 Case to a liquidation case under chapter 7, and a largely consensual exit from bankruptcy premised on resolution of significant litigation and continuation of the development of the Inspirada Project would be frustrated and lost.

19 Based on the foregoing, the Trustee submits that the immediate approval and
20 implementation of the TIP Facility and the proposed use of the LID Proceeds, subject to the
21 Budget, is in the best interests of the Estate and, therefore, should be approved.

III.

Argument

A. The Trustee Has Satisfied the Legal Requirements for Approval of the TIP Facility.

26 Bankruptcy Code section 364 states that a trustee that is authorized to operate the
27 business of a debtor may obtain financing either in the ordinary course of business or outside the
28 ordinary course of business. First, Bankruptcy Code section 364(a) allows the trustee to obtain

1 unsecured credit and to incur unsecured debt in the ordinary course of business. 11 U.S.C.
 2 § 364(a). Second, after notice and a hearing, the Court may authorize a trustee to obtain
 3 financing outside the ordinary course of business. Id. at § 364(b).

4 Bankruptcy Code section 364 is structured with an escalating series of
 5 inducements that a trustee may offer to attract postpetition credit outside of the ordinary course
 6 of business. In re Photo Promotion Assoc., Inc., 87 B.R. 835, 839 (Bankr. S.D.N.Y. 1988), aff'd,
 7 881 F.2d 6 (2d Cir. 1989). Specifically, when a trustee cannot obtain "basic" unsecured
 8 postpetition credit, more specialized forms of credit may be obtained under certain prescribed
 9 conditions. See In re T.M. Sweeney & Sons LTL Servs., Inc., 131 B.R. 984, 989 (Bankr. N.D.
 10 Ill. 1991). Initially, Bankruptcy Code section 364(b) states that the postpetition financing may
 11 be allowable as an administrative expense under Bankruptcy Code section 503(b)(1). 11 U.S.C.
 12 § 364(b). If lenders are unwilling to extend credit to a trustee on a general administrative
 13 expense priority basis, then, upon notice and a hearing, further inducements can be offered,
 14 including (i) superpriority administrative expense status for the postpetition credit, (ii) liens on
 15 any unencumbered property of the estate, and (iii) liens junior to existing liens on property of the
 16 estate. Id. at § 364(c)(1)-(3).

17 Should the Trustee be unable to obtain credit under either Bankruptcy Code
 18 section 364(b) or (c), then the Court, after notice and a hearing, may authorize the Trustee to
 19 obtain credit secured by a lien on Estate property that primes or is equal in priority to existing
 20 liens on such property, provided that the Trustee can provide any existing lienholder with
 21 adequate protection of its interests. Id. at § 364(d)(1)(A) and (B).

22 **1. The Trustee Is Unable to Obtain Similar Financing From Other
 23 Sources.**

24 To demonstrate that the requisite credit is not obtainable on an unsecured,
 25 superpriority or junior lien basis, the trustee need only demonstrate "by good faith effort that
 26 credit was not available" without the protections afforded to potential lenders by section 364(b)
 27 or (c) of the Bankruptcy Code. Bray v. Shenandoah Fed. Sav. & Loan Ass'n (In re Snowshoe
 28 Co.), 789 F.2d 1085, 1088 (4th Cir. 1986). Thus, "[t]he statute imposes no duty to seek credit

1 from every possible lender before concluding that such credit is unavailable.” Id. at 1088; see
 2 also In re Ames Dept. Stores, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) (holding that debtor made
 3 a reasonable effort to secure financing when it selected the least onerous financing option from
 4 the two remaining lenders); In re Reading Tube Indus., 72 B.R. 329, 332 (Bankr. E.D. Pa. 1987)
 5 (“Given the ‘time is of the essence’ nature of this type of financing, we would not require this or
 6 any debtor to contact a seemingly infinite number of possible lenders.”). Where few lenders are
 7 likely to be able and willing to extend the necessary credit to a trustee, “it would be unrealistic
 8 and unnecessary to require [the debtor] to conduct such an exhaustive search for financing.” In
 9 re Sky Valley, Inc., 100 B.R. 107, 113 (Bankr. N.D. Ga. 1988).

10 This threshold test is certainly satisfied here. First, the Agent and the Prepetition
 11 Lenders are only providing the Estate with financing in the form of the existing consent to use of
 12 cash collateral or securing advances from the Disputed MI Deposit account, with or without the
 13 consent of Focus during the pendency of the adversary proceeding commenced by the Trustee to
 14 effect a turnover to the estate of the funds in that account. Second, the interest and fee-free
 15 financing offered under the TIP Facility is unique and is the result of the Builder Lenders’ desire
 16 to resolve exposure to the Agent under repayment guaranties and maintain ownership of the
 17 Project properties. The Builder Lenders will not profit from the TIP Facility other than through
 18 their ability to implement the Plan Support Agreement and thereby (i) enable the Debtor to exit
 19 from bankruptcy and (ii) acquire control of the Project within the next several months. The
 20 Trustee asks that the Court take judicial notice of the fact that the commercial lender marketplace
 21 does not typically offer loans on which the lenders will not profit through the imposition of
 22 interest and fees.

23 Finally, although the TIP Facility will grant the Builder Lenders a priming lien on
 24 the LID Proceeds, the Agent and the Consenting Lenders do not object to the TIP Facility and its
 25 priming feature, as an element of the Plan Support Agreement. In fact, by virtue of the Plan
 26 Support Agreement, the Agent and the Consenting Lenders cannot support another party’s
 27 provision of a postpetition loan facility.

28

1 Based on the foregoing, the Trustee does not believe that she could obtain
 2 postpetition financing on any basis (priming or otherwise) from a source other than the Builder
 3 Lenders.

4 **2. The Agent and Prepetition Lenders are Adequately Protected.**

5 With respect to the adequate protection requirement under Bankruptcy Code
 6 section 364(d)(1)(B), the burden of proving such adequate protection rests with the Trustee. 11
 7 U.S.C. § 364(d)(2). The Bankruptcy Code states that adequate protection may be provided by a
 8 cash payment or periodic cash payments to the secured creditor, the grant of an additional or
 9 replacement lien, or such other relief “as will result in the realization by such entity of the
 10 indubitable equivalent of such entity's interest.” *Id.* at § 361. Courts have noted that this
 11 definition of adequate protection “confers upon the parties and the courts flexibility.” In re 495
 12 Central Park Avenue Corp., 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992); see also Resolution
 13 Trustee Corp. v. Swedeland Development Group (In re Swedeland Development Group), 16 F.3d
 14 552, 564 (3rd Cir. 1994) (“Whether protection is adequate ‘depends directly on how effectively it
 15 compensates the secured creditor for loss of value’ caused by the superpriority given the post-
 16 petition loan.”). Furthermore, where the secured creditor's interest in the value of the collateral
 17 is not diminishing by its use, sale or lease, it follows that the secured creditor's interest is
 18 adequately protected. See U.S. Savings Assoc. of Tex. v. Timbers of Inwood Forest Assoc. Ltd.,
 19 484 U.S. 365, 369-73 (1988).

20 In light of the terms of the Plan Support Agreement and the adequate protection
 21 offered to the Agent (on behalf of the Prepetition Lenders), the Agent has consented to the
 22 priming lien on the Collateral. See e.g., Anchor Sav. Bank FSB v. Sky Valley, Inc., 99 B.R. 117,
 23 122 (N.D. Ga. 1989) (“The fact that . . . undersecured lienholders either did not object or
 24 withdrew their objections to the superpriority financing must mean that they expect to derive
 25 some benefit from the transaction . . . [B]y tacitly consenting to the superpriority lien, those
 26 creditors relieved the debtor of having to demonstrate that they were adequately protected”).

Even if the Agent and the Prepetition Lenders objected to the terms of the TIP Facility, the Trustee submits that their primed security interests in the LID Proceeds nonetheless would be adequately protected by the TIP Facility. The TIP Facility will enable the Trustee to complete LID infrastructure build-outs that are a prerequisite for the receipt by the Estate of \$34.1 million in LID Proceeds reimbursements, an amount in excess of the funds that will be lent to the Trustee on a priming basis and repaid from the LID Proceeds generated thereby. As of the date hereof, approximately \$89.7 million in LID Proceeds contained in the Acquisition Fund remain undisbursed. Certain of those projects, however, *are* substantially complete, requiring only incremental additional work to reach completion. If such improvements can be completed and the other conditions precedent to the recovery of the LID Proceeds can be fulfilled, the Estate will be able to recover approximately \$34.1 million in LID Proceeds, at an actual cost to complete of approximately \$6.2 million. The Trustee intends to use the TIP Facility to fund the completion of those already substantially completed LID segments that will entitle the Estate to recover LID Proceeds in amounts significantly in excess of the actual cost of completion. Those LID Proceeds would not be available to the Estate absent the TIP Facility.

Moreover, the TIP Facility implements a settlement that, if successful, will result in the near-term satisfaction of the Estate's outstanding obligations on the Prepetition Loan through a consensual plan of reorganization. The TIP Facility, together with the Settlement, also will allow the Estate and the Settling Parties to avoid what inevitably would be time-consuming and expensive litigation. The TIP Facility also ensures the ongoing administrative solvency of the Estate and preserves the value of the Agent's and the Prepetition Lenders' collateral. Finally, the Trustee believes that the resulting cost savings will only enhance the overall value to be recovered by the Estate's economic stakeholders. The TIP Facility is critical to the implementation of the Settlement, and is intended to bridge the Estate to a near-term exit from this Chapter 11 Case through a confirmed plan of reorganization that will have the consent of the largest creditor and a super-majority of the equity constituents in the Chapter 11 Case, provide necessary consideration for the fair and appropriate treatment of all other constituencies, and get the Project back on track after languishing to the detriment of the City of Henderson, current

1 residents of the Project and other parties in interest over the past few years. The Trustee believes
 2 the TIP Facility is in the best interests of the Estate and should be approved by the Court.

3 **B. The Trustee's Use of the LID Proceeds Should Be Authorized.**

4 Pursuant to section 363(c)(2) of the Bankruptcy Code, the Trustee may not use
 5 cash collateral unless “(A) each entity that has an interest in such cash collateral consents; or
 6 (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the
 7 provisions of this section.” 11 U.S.C. § 363(c)(2). Even with secured creditor consent,
 8 Bankruptcy Code section 361 provides that secured creditors are entitled to adequate protection
 9 where the use of collateral decreases the value of such lenders’ interest in the collateral. 11
 10 U.S.C. § 361(1)-(3); see also Timbers, 484 U.S. at 369-73 (the “interest in property” entitled to
 11 protection is “the value of the collateral” that secures the claim). The legislative history of
 12 section 361 makes clear that bankruptcy courts are given broad flexibility in deciding what
 13 constitutes adequate protection on a case-by-case basis, stating:

14 This section specifies the means by which adequate protection may be
 15 provided. It does not require the court to provide it. To do so would place
 16 the court in an administrative role. Instead, the trustee or debtor in
 17 possession will provide or propose a protection method. If the party that is
 18 affected by the proposed action objects, the court will determine whether
 19 the protection provided is adequate. The purpose of this section is to
 20 illustrate means by which it may be provided and to define the contours of
 21 the concept.

22 H.R. Rep. No. 95-595, at 338, 95th Cong., 1st Sess. (1977); see also Swedeland, 16 F.3d at 564
 23 (“[A] determination of whether there is adequate protection is made on a case by case basis.”);
MBank Dallas, N.A. v. O’Connor (In re O’Connor), 808 F.2d 1393, 1396-97 (10th Cir. 1987)
 24 (same); In re Martin, 761 F.2d 472, 474 (8th Cir. 1985) (same).

25 Courts also generally give broad deference to the business decisions of a trustee
 26 or a debtor in possession. See Simantob v. Claims Prosecutor, LLC (In re Lahijani), 325 B.R.
 27 282, 289 (B.A.P 9th Cir. 2005) (“Ordinarily, the position of the trustee is afforded deference,
 28 particularly where business judgment is entailed in the analysis or where there is no objection.”);
Walter v. Sunwest Bank (In re Walter), 83 B.R. 14, 19-20 (B.A.P. 9th Cir. 1987); In re Pilgrim’s

Pride Corp., 401 B.R. 229, 237 (Bankr. N.D. Tex. 2009) (“In applying the simple business judgment test, courts are adjured to defer to the debtor in possession or trustee; if a valid business reason is shown for a transaction, the transaction is to be presumed appropriate.”); see also Naert v. Daff (In re Washington Trust Deed Service Corp.), 224 B.R. 109 (B.A.P. 9th Cir. 1998).

5 Here, for all of the reasons set forth above, the Trustee believes that the use of the
6 LID Proceeds as contemplated in the Budget is in the Estate's best interests. The Trustee's use
7 of the LID Proceeds, subject to and in accordance with the Budget, therefore represents a sound
8 exercise of the Trustee's business judgment. Furthermore, the Agent's consent satisfies the
9 requirements of Bankruptcy Code sections 361 and 363(c)(2)(A) (use of cash collateral with
10 consent of secured party or other interested party, and grant of adequate protection). Finally, for
11 all of the reasons set forth above, the Trustee submits that the Agent and the Prepetition Lenders'
12 interests in the LID Proceeds are adequately protected.

IV.

Final Hearing Date

15 Pursuant to Bankruptcy Rules 4001(b) and (c), the Trustee requests that the Court
16 schedule a hearing to consider approval of the Motion on a final basis such that, if the Court
17 decides to approve the Motion on a final basis, a Final Order can be entered by no later than
18 August 12, 2011.

V.

Notice

21 Notice of this Motion will be given by hand delivery and/or electronic means to:
22 (i) the Office of the United States Trustee for the District of Nevada; (ii) counsel for the Builder
23 Lenders, Stutman, Treister & Glatt P.C., 1901 Avenue of the Stars, 12th Floor, Los Angeles, CA
24 90067, Attention: Robert A. Greenfield and K. John Shaffer; (iii) counsel for the Agent,
25 Morrison & Foerster LLP, 1290 Avenue of the Americas, New York, NY 10104, Attention:
26 James Hough and Norman Rosenbaum; Morrison & Foerster LLP, 425 Market Street, San
27 Francisco, CA 94105, Attention: G. Larry Engel; and Lewis and Roca LLP, 3993 Howard
28 Hughes Parkway, Suite 600, Las Vegas, NV 89169-5996, Attention: Robert M. Charles, Jr.; (iv)

1 counsel to Focus, White & Case LLP, 633 West Fifth Street, Suite 1900, Los Angeles, CA
2 90071-2007, Attention: Roberto Kampfner; (v) counsel to Meritage, Fennemore Craig, 300 S.
3 Fourth Street, Suite 1400 Las Vegas, Nevada 89101, Attention Laurel E. Davis; (vi) counsel to
4 the Debtor, Klee, Tuchin, Bogdanoff & Stern LLP, 1999 Avenue of the Stars, Thirty-Ninth
5 Floor, Los Angeles, CA 90067-6049, Attention: David M. Stern; (vii) the top twenty unsecured
6 creditors of the Estate (exclusive of the Prepetition Lenders) identified by the Trustee in
7 Schedule F of the Debtors' Schedules of Assets and Liabilities; (viii) the City of Henderson; (ix)
8 the Indenture Trustee for the bonds issued by the City of Henderson in connection with Local
9 Improvement District T-18; and (x) all other parties requesting notices pursuant to Bankruptcy
10 Rule 2002 (collectively, the "Notice Parties"). The Trustee submits that no other or further
11 notice need be provided.

12 Any objections to the proposed Final Order shall be in writing and shall be filed
13 with the Court and served by overnight mail service on: (i) counsel for the Trustee (as identified
14 above); (ii) the Office of the United States Trustee; (iii) counsel for the Builder Lenders (as
15 identified above); and (iv) counsel for the Agent (as identified above), so that it is received by no
16 later than July 19, 2011.

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1 VI.
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3 **Conclusion**
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5 Based upon all the foregoing, the Trustee respectfully requests that the Court
6 enter the Interim Order, in substantially the form attached hereto as Exhibit 1, and the Final
7 Order, the form of which will be submitted to the Court prior to the Final Hearing, and grant
8 such other relief as the Court deems just and proper.

9 Dated: July 8, 2011
10

11 Respectfully submitted,
12

13 By: /s/ Robert J. Moore
14 MILBANK, TWEED, HADLEY & McCLOY LLP
15 Robert J. Moore (CA State Bar No. 77495)
16 David B. Zolkin (CA State Bar No. 155410)
17 601 South Figueroa Street, 30th Floor
18 Los Angeles, California 90017
19

20 *Counsel for*
21 *Chapter 11 Trustee*
22

23 SCHWARTZER & McPHERSON LAW FIRM
24 Lenard E. Schwartzer, Nevada Bar No. 0399
25 Jeanette E. McPherson, Nevada Bar No. 5423
26 2850 South Jones Boulevard, Suite 1
27 Las Vegas, Nevada 89146-5308
28

29 *Local Counsel 11 for*
30 *Chapter 11 Trustee*
31

EXHIBIT 1

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7 Robert J. Moore (CA State Bar No. 77495)
David B. Zolkin (CA State Bar No. 155410)
8 MILBANK, TWEED, HADLEY & McCLOY LLP
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9
10
11 *Counsel For Chapter 11 Trustee*

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13 *Local Counsel For Chapter 11 Trustee*

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28 **UNITED STATES BANKRUPTCY COURT**

DISTRICT OF NEVADA

In re:

SOUTH EDGE, LLC,

Debtor.

Chapter 11

Case No. BK-10-32968 (BAM)

INTERIM ORDER (1) AUTHORIZING CHAPTER 11 TRUSTEE TO OBTAIN SENIOR PRIMING SECURED POSTPETITION FINANCING; (2) AUTHORIZING CHAPTER 11 TRUSTEE'S USE OF CASH COLLATERAL; (3) DEEMING AGENT, PREPETITION LENDERS AND BUILDERS LENDERS TO BE ADEQUATELY PROTECTED; AND (4) SCHEDULING A FINAL HEARING

Hearing Date: July 20, 2011

Hearing Time: 9:30 a.m.

THIS MATTER having come before the Court upon the motion (the "Motion") of Cynthia Nelson, the chapter 11 trustee (the "Trustee") in the chapter 11 bankruptcy case (the

1 “Chapter 11 Case”) of South Edge, LLC (“South Edge” or the “Debtor”), seeking, among other
 2 things, entry of an interim order (this “Interim Order”):¹
 3

4 (i) authorizing and approving the Trustee to obtain postpetition financing in an
 5 aggregate principal amount not to exceed \$21.4 million, with an initial, interim borrowing limit
 6 of up to \$4.0 million (the “TIP Facility”), pursuant to that certain Trustee Financing
 7 Agreement(the “TIP Loan Agreement”; and together with any related documents required to be
 8 delivered by or in connection with the TIP Loan Agreement, the “TIP Loan Documents”), by and
 9 among the Trustee, as borrower, and certain affiliates of the Settling Builders, as lenders (the
 10 “Builder Lenders”), with such TIP Facility secured by first priority priming liens (the “TIP
 11 Financing Liens”) on all of the Debtor’s interests in the Collateral (defined below), pursuant to
 12 section 364(d) of the Bankruptcy Code, and with priority, as to administrative expenses, as
 13 provided in section 364(c)(1) of the Bankruptcy Code;

14 (ii) authorizing the use of LID Proceeds, as cash collateral of the Agent, the
 15 Prepetition Lenders and the Builder Lenders, to pay for the chapter 11 estate’s (the “Estate”)
 16 administrative expenses and repay the loans made pursuant to the TIP Facility, in accordance
 17 with the Terms of the TIP Loan Documents;

18 (iii) granting the Agent, on behalf of the Prepetition Lenders, adequate protection for
 19 the use of its cash collateral and any diminution in the value thereof; and

20 (iv) scheduling a final hearing on the Motion (the “Final Hearing”) for August [__],
 21 2011 to consider entry of an order (“Final Order”) granting the relief requested in the Motion on
 22 a final basis.

23 Having considered the Motion, the TIP Loan Agreement, the Plan Support Agreement (in
 24 its redacted form), and the Trustee’s Consent, and the record established and the evidence

25
 26 ¹ Any capitalized term used but not defined herein shall have the meaning ascribed to it in the Motion or
 27 the TIP Loan Agreement (defined below), as applicable.
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1 submitted at the interim hearing on the Motion (the “Interim Hearing”) and the statements of
2 counsel at the Interim Hearing; finding that due and proper notice of the Motion and the Interim
3 Hearing having been given, and the Interim Hearing having been held and concluded on July 20,
4 2011 in accordance with Bankruptcy Rules 2002, 4001 and 9014; and it appearing that approval
5 of the interim relief requested in the Motion is necessary to avoid immediate and irreparable
6 harm to the Estate pending the Final Hearing and otherwise is fair and reasonable and in the best
7 interests of the Estate and its creditors and equity holders, and is essential for the continued
8 operation of the Debtor’s business and the preservation of the Estate’s value; and it further
9 appearing that the Trustee is unable to secure postpetition financing on terms and conditions that
10 are better than those set forth in this Interim Order and the TIP Loan Agreement, that there is
11 adequate protection of the Agent’s and the Prepetition Lenders’ interests in the LID Proceeds (i)
12 against which the priming TIP Financing Liens are to be granted in favor of the Builder Lenders
13 and (ii) that are to be used by the Trustee as cash collateral, that the Agent has consented² to the
14 TIP Facility, including its priming lien feature, that the Agent has consented to the use of the
15 LID Proceeds as cash collateral as set forth in this Interim Order and the TIP Loan Agreement,
16 that the Agent, the Consenting Lenders and the Settling Builders (collectively, the “Settling
17 Parties”) are parties to the Plan Support Agreement, and that all objections, if any, to the entry of
18 this Interim Order have been withdrawn, resolved or overruled by the Court, or continued to the
19 Final Hearing; and having taken into consideration all pleadings filed with this Court, all
20 proceedings held before the Court, and the evidence adduced in connection therewith in this
21 Chapter 11 Case; and after due deliberation and consideration, and good and sufficient cause
22 appearing therefor,

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25 ² The Agent’s consent to the terms of the TIP Loan Agreement is conditional, and at this time there
26 remain certain unresolved issues between the Settling Builders and the Agent in the Budget. Therefore,
the Agent has reserved its right to withdraw its consent to the TIP Loan Agreement at any time before the
start of the hearing on the Interim Order on July 20, 2011.

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2 **THE COURT HEREBY MAKES THE FOLLOWING FINDINGS OF FACT AND**
3 **CONCLUSIONS OF LAW:**

4 A. Involuntary Petition Date; Motion for Trustee. On December 9, 2010, certain of
5 the Prepetition Lenders filed an involuntary chapter 11 petition against the Debtor (the
6 “Involuntary Petition”). In connection with the Involuntary Petition, the Agent filed a motion
7 seeking appointment of a chapter 11 trustee for the Debtor [Docket No. 7] (the “Trustee
8 Motion”).

9 B. Appointment of Trustee. On February 3, 2011, the Court entered an order for
10 relief under chapter 11 of the Bankruptcy Code against the Debtor [Docket No. 400] and issued
11 an order directing the appointment of a chapter 11 trustee [Docket No. 401]. On February 20,
12 2011, the Office of the United States Trustee (the “UST”) designated the Trustee to serve as
13 trustee for the Estate [Docket No. 441], and on February 23, 2011, the Court entered an order
14 approving the appointment of the Trustee as chapter 11 trustee for the Debtor (the “Appointment
15 Order”). [Docket No. 449]. No official committee of creditors has been appointed in this
16 Chapter 11 Case.

17 C. Jurisdiction and Venue. This Court has jurisdiction, pursuant to 28 U.S.C.
18 §§ 157(b) and 1334, over these proceedings, and over the persons and property affected hereby.
19 Consideration of the Motion constitutes a core proceeding under 28 U.S.C. § 157(b)(2). Venue
20 for the Chapter 11 Case and proceedings on the Motion is proper in this district pursuant to 28
21 U.S.C. §§ 1408 and 1409.

22 D. Notice. Notice of the Interim Hearing and the relief requested in the Motion has
23 been provided by the Trustee, either by facsimile, email, overnight courier or hand delivery, to
24 certain parties in interest, including: (i) the Office of the United States Trustee for the District of
25 Nevada; (ii) counsel to the Builder Lenders; (iii) counsel to the Agent; (iv) counsel to Focus
26 South Group, LLC and its affiliates (“Focus”); (v) counsel to Meritage Homes of Nevada, Inc.
27 and its affiliates (“Meritage”); (vi) counsel to the Debtor; (vii) the top twenty unsecured creditors

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of the Estate (exclusive of the Prepetition Lenders) identified by the Trustee in Schedule F of the Debtor's Schedules of Assets and Liabilities; (viii) the City of Henderson; (ix) the Indenture Trustee for the bonds issued by the City of Henderson in connection with Local Improvement District T-18; and (x) all other parties requesting notices pursuant to Bankruptcy Rule 2002 (collectively, the "Notice Parties"). Under the circumstances, such notice of the Interim Hearing and the relief requested in the Motion constitutes due and sufficient notice and complies with sections 102(1), 364(c) and 364(d) of the Bankruptcy Code and Bankruptcy Rules 2002, 4001(b), 4001(c), and 9014.

10 E. Findings Regarding the Post-Petition Financing and Use of the LID Proceeds.

11 (i) On April 21, 2011, the Court entered a final order [Docket No. 624] that
12 approved that certain Stipulation Providing For Postpetition Financing and Use of Cash Collateral
13 (the "Cash Collateral Stipulation"), between and among JPMorgan, as Agent, the Trustee and
14 certain the members of the Debtor and that was subsequently amended by periodic extensions
15 [*see* Docket Nos. 676, 736 and] (collectively, the "Cash Collateral Orders"). The Cash
16 Collateral Orders have provided the Trustee with continued use of the Agent's cash collateral
17 through the date of this Interim Order.

18 (ii) As recently confirmed by the Trustee, *see* Docket No. 766, the Agent, for
19 the benefit of the Prepetition Lenders holds a valid, perfected, priority and unavoidable lien in
20 substantially all of the Debtor's real and personal property, including, but not limited to, the
21 Collateral. The Collateral and the proceeds thereof constitutes the Agent's cash collateral under
22 section 363(a) of the Bankruptcy Code.

23 (iii) Except as set forth in the TIP Loan Agreement with respect to the
24 Collateral, the Agent's liens in and to the Debtor's and the Estate's assets granted to the Agent,
25 for itself and the benefit of the Lenders, in accordance with the terms of the Cash Collateral
26 Orders and the first priority nature thereof, shall be unaffected by the terms of the TIP Loan
27 Agreement, the Interim Financing Order and the Final Financing Order and shall remain in full

1 force and effect.

2
3 (iv) Need for Post-Petition Financing and Use of the LID Proceeds. The
4 Estate has limited cash availability. An immediate need exists for the TIP Facility so as to
5 enable the Trustee to fund among other things, (a) operating disbursements on account of, among
6 other items, the further construction of infrastructure segments of the Debtor's residential real
7 estate Project, commonly known as "Inspirada" (the "Project"), Project maintenance, security,
8 surety bond obligations, and the administration of reimbursements of LID Proceeds, (b) LID
9 Bond assessments and property taxes and (c) bankruptcy related disbursements, including UST
10 fees, the reasonable fees of the Agent's and Prepetition Lenders' professionals and the allowed
11 fees and expenses of the Trustee and her professionals. The TIP Facility is essential to the
12 implementation of the Plan Support Agreement to which the Trustee has granted her consent,
13 subject to the terms and conditions of the Trustee's Consent. The use of the TIP Facility
14 proceeds as contemplated in the Budget that is attached to the TIP Loan Agreement as Exhibit A
15 will enable the Trustee to preserve the value of the Estate by, among other things, completing
16 certain infrastructure construction at the Project, which, in turn, will lead to approximately
17 \$34.1 million in LID reimbursements that would otherwise be unavailable to the Estate (and/or
18 any successor to the Estate). Without the TIP Facility and the use of the LID Proceeds, the
19 Estate and its economic stakeholders would suffer immediate and irreparable harm.

20 (v) No Credit Available on More Favorable Terms. The Trustee is unable to
21 obtain unsecured credit allowable under Bankruptcy Code section 503(b)(1) as an administrative
22 expense. The Trustee also is unable to obtain secured credit on more favorable terms and
23 conditions than those provided in the TIP Loan Agreement and this Interim Order. The Trustee
24 is unable to obtain credit for borrowed money without granting to the Builder Lenders (a) the
25 priming TIP Financing Liens on the Collateral pursuant to Bankruptcy Code sections 364(d); and
26 (b) superpriority administrative expense claim status pursuant to Bankruptcy Code section
27 364(c)(1), senior to all other administrative expenses under Bankruptcy Code sections 503(b)

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2 and 507(b) (but pari passu with Agent's superpriority administrative expense claim granted to
3 Agent, for the benefit of the Lenders, under the Cash Collateral Orders).

4 F. Extension of Financing. The Builder Lenders have indicated a willingness to
5 provide financing to the Trustee in accordance with the TIP Loan Agreement and subject to,
6 among other things, (i) the entry of this Interim Order and the subsequent entry of a Final Order,
7 and (ii) findings by the Court that the Builder Lenders are good faith financiers, and that the
8 Builder Lenders' claims, superpriority claims, security interests and liens and other protections
9 granted pursuant to this Interim Order and the TIP Facility will not be affected by any
10 subsequent reversal, modification, vacatur or amendment of this Interim Order or any other
11 order, as provided in section 364(e) of the Bankruptcy Code.

12 G. Business Judgment and Good Faith Pursuant to Section 364(e). The terms and
13 conditions of the TIP Facility, the TIP Loan Agreement and the use of the LID Proceeds as
14 contemplated therein are fair, reasonable, and the best available under the circumstances, reflect
15 the Trustee's exercise of prudent business judgment consistent with her fiduciary duties, and are
16 supported by reasonably equivalent value and consideration. The TIP Facility and the use of the
17 LID Proceeds were negotiated extensively, in good faith and at arms' length between the Trustee
18 and the Builder Lenders, with the substantial input by and the consent of the Agent. The credit
19 to be extended under the TIP Facility is and will be so extended in good faith, and for valid
20 business purposes and uses, the consequence of which is that the Builder Lenders are entitled to
21 the protection and benefits of section 364(e) of the Bankruptcy Code.

22 H. Adequate Protection of the Agent and Prepetition Lenders. In consideration for
23 the Agent's Adequate Protection Liens under the TIP Loan Agreement and the superpriority
24 administrative expense claim granted to the Agent herein, the Agent has consented to the
25 priming of its security interest against the LID Proceeds by the liens granted to the Builder
26 Lenders pursuant to the TIP Facility.

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 2 I. Benefits of TIP Facility. The TIP Facility will enable the Trustee to complete
 3 LID infrastructure build-outs that are a prerequisite for the Estate's (and/or any successor
 4 entity's) reimbursement of \$34.1 million in LID Proceeds. Moreover, the TIP Facility facilitates
 5 a settlement that, if successful, will result in the near-term resolution of the Estate's outstanding
 6 obligations on the Prepetition Loan through a plan of reorganization to be proposed to the Court
 7 by creditors that, in the aggregate, hold a substantial majority (in dollar amount) of the claims
 8 against the Estate and equity holders that, in the aggregate, hold a substantial majority of the
 9 equity in the Debtor. The TIP Facility, together with the Settlement, will allow the Settling
 10 Parties (e.g., the Agent, the Consenting Lenders and the Settling Builders) and the Estate to
 11 avoid what inevitably would be time-consuming and expensive litigation. The TIP Facility also
 12 ensures that the Estate will remain administratively solvent. The cost savings associated with the
 13 successful implementation of the Settlement will enhance the overall value to be recovered by
 14 the Settling Parties, who are the Estate's primary economic stakeholders.

15 J. Entry of Interim Order. For the reasons stated above, the Trustee has requested
 16 immediate entry of this Interim Order pursuant to Bankruptcy Rule 4001(c)(2).

17 NOW, THEREFORE, on the Motion of the Trustee and the record before the Court with
 18 respect to the Motion, and with the consent of the Builder Lenders and the Agent to the form and
 19 entry of this Interim Order, and good and sufficient cause appearing therefor,

20 **IT IS ORDERED THAT:**

21 1. Motion Granted. The Motion is granted in its entirety subject to the terms and
 22 conditions set forth in this Interim Order.

23 2. TIP Loan Agreement Authorization.

24 (a) Approval of TIP Facility. The Trustee is expressly and immediately authorized,
 25 empowered and directed to execute, deliver and enter into the TIP Loan Agreement and to incur
 26 and to perform the Obligations in accordance with, and subject to, the terms of this Interim Order
 27 and the TIP Loan Agreement, and to deliver all instruments and documents that may be required

1 or necessary for the performance by the Trustee under the TIP Facility and the creation and
2 perfection of the TIP Financing Liens described in and provided for by this Interim Order and the
3 TIP Loan Agreement. Upon execution and delivery, the Obligations created under the TIP Loan
4 Agreement shall represent valid and binding obligations of the Estate, enforceable against the
5 Estate in accordance with the terms of the TIP Loan Agreement.

6
7 (b) Authorization to Borrow. Subject to the terms and conditions of this Interim
8 Order, the TIP Loan Agreement, and any other TIP Loan Documents, and in accordance with the
9 Budget, the Trustee is hereby authorized under the TIP Facility to borrow up to the amount of
10 \$4.5 million during the period between the entry of this Interim Order and the entry of a Final
11 Order.

12
13 (c) TIP Financing Liens. Effective upon the entry of this Interim Order and subject
14 to the TIP Loan Agreement, the Builder Lenders are granted the TIP Financing Liens pursuant to
15 sections 361, 362 and 364(d) of the Bankruptcy Code, meaning a first priority, priming,
16 continuing, valid, binding, enforceable, non-avoidable and automatically perfected postpetition
17 security interest in and lien on the Collateral presently owned and hereafter acquired by the
18 Estate, which shall consist of any and all rights of the Trustee and the Estate to receive payments
19 or reimbursements of LID Proceeds, whether such rights constitute general intangibles, accounts,
20 accounts receivable, contract rights, commercial tort claims, or deposit accounts relating thereto,
21 and all proceeds, products, offspring, or profits thereof (including cash), and including all
22 payments owing or made under the Acquisition Agreement, but the Collateral shall not include the
23 Acquisition Agreement itself.

24
25 (d) Agent's Adequate Protection. Effective upon the entry of this Interim Order and
26 subject to the TIP Loan Agreement, the Agent (on its behalf and on behalf of the Prepetition
27 Lenders) is hereby granted the Adequate Protection Liens pursuant to sections 361, 363(e) and
364(d)(1) of the Bankruptcy Code, meaning, as adequate protection for any diminution in the
value of the Agent's interest in the Collateral securing the Debtor's obligations under the

1 Prepetition Credit Agreement resulting from, the use of the Collateral and imposition of the
 2 automatic stay (the “Adequate Protection Obligations”): (x) a second priority (subject only to the
 3 TIP Financing Liens), priming, continuing, valid, binding, enforceable, non-avoidable and
 4 automatically perfected postpetition security interest in and lien on the Collateral presently
 5 owned and hereafter acquired by the Estate, which shall consist of any and all rights of the
 6 Trustee and the Estate to receive payments or reimbursements of LID Proceeds, whether such
 7 rights constitute general intangibles, accounts, accounts receivable, contract rights, commercial tort
 8 claims, or deposit accounts relating thereto, and all proceeds, products, offspring, or profits thereof
 9 (including cash), and including all payments owing or made under the Acquisition Agreement, but
 10 the Collateral shall not include the Acquisition Agreement itself, and (y) a first priority priming,
 11 continuing, valid, binding, enforceable, non-avoidable and automatically perfected postpetition
 12 security interest in and lien on all assets (other than the Collateral and any claims and causes of
 13 action under section 544, 545, 547, 548, 549, or 550 of the Bankruptcy Code, or the proceeds
 14 such claims and causes of action) presently owned and hereafter acquired by the Estate and all
 15 products and proceeds thereof, but subject to the Permitted Liens (as such term is defined in the
 16 Cash Collateral Stipulation), but only to the extent that such Permitted Liens are valid and
 17 perfected under applicable non-bankruptcy law and are not avoided or subordinated under the
 18 Bankruptcy Code. Agent, for the benefit of the Prepetition Lenders, is granted an allowed
 19 superpriority administrative expense claim as provided for under section 507(b) of the Bankruptcy
 20 Code on account of the Adequate Protection Obligations (the “Adequate Protection Superpriority
 21 Claim”), which shall be junior to the TIP Loan Superpriority Claim (defined herein).

23 (e) TIP Financing Lien Priority. The TIP Financing Liens granted to the Builder
 24 Lenders (i) are created pursuant to section 364(d) of the Bankruptcy Code, (ii) are first priority,
 25 priming, valid, prior, perfected, unavoidable, and superior to any security interest, mortgage, or
 26 collateral interest or lien or claim in, on or to the Collateral, and are subject only to the Permitted
 27 Liens, if any, but only to the extent that such Permitted Liens are valid and perfected under

1
2 applicable non-bankruptcy law and are not avoided or subordinated under the Bankruptcy Code;
3 and (iii) shall secure all Obligations under the TIP Facility.

4 (f) Enforceable Obligations. The TIP Loan Agreement shall constitute and evidence
5 the valid and binding obligations of the Estate, which Obligations shall be enforceable against
6 the Estate, and any successors thereto.

7 (g) Conditions Precedent to Making Advances. The Builder Lenders shall have no
8 obligation to make any advances pursuant to the TIP Facility unless all of the conditions
9 precedent to the making of such advances under the TIP Facility are satisfied or waived by the
10 Builders Lenders in accordance with the TIP Loan Agreement.

11 (h) Superpriority Administrative Claim Status. All Obligations under the TIP
12 Facility shall be allowed superpriority administrative expense claims (the “TIP Loan
13 Superpriority Claim” and, together with the TIP Loan Liens, the “TIP Loan Protections”) with
14 priority in the Chapter 11 Case under section 364(c)(l) of the Bankruptcy Code and otherwise
15 over all administrative expense claims and unsecured claims against the Debtor and the Estate,
16 now existing or hereafter arising, of any kind or nature whatsoever including, without limitation,
17 administrative expenses of the kinds specified in or ordered pursuant to Bankruptcy Code
18 sections 503(b) and 507(b); provided, however, such TIP Loan Superpriority Claim shall be *pari*
19 *passu* with the superpriority administrative expense claim granted to the Agent (for the benefit of
20 the Prepetition Lenders) under the Cash Collateral Orders.

21 3. Post-Petition Lien Perfection. This Interim Order shall be sufficient and
22 conclusive evidence of the validity, perfection, and priority of the TIP Loan Liens and the
23 Agent’s Adequate Protection Liens without the necessity of filing or recording any financing
24 statement or other instrument or document that may otherwise be required under the law of any
25 jurisdiction or the taking of any other action to validate or perfect the TIP Loan Liens or the
26 Agent’s Adequate Protection Liens or to entitle the Builder Lenders or the Agent to the priorities
27 granted herein. Notwithstanding the foregoing, the Trustee shall, at the request of the Builder

Lenders or the Agent, at any time and from time to time, execute and deliver to the Builder Lenders or the Agent such security agreements, mortgages, financing statements, documents, and other agreements and instruments (and, subject to sufficient availability of funding and any restrictions in the Budget, pay the cost of filing or recording the same in all public offices deemed reasonably necessary or desirable by the Builder Lenders) and do such other acts and things as the Builder Lenders or the Agent may reasonably deem necessary or desirable in order to establish and maintain the validity, attachment, and perfection of the liens of the Builder Lenders and the Agent granted in this Interim Order (free and clear of all other liens, claims, and rights of third parties whatsoever, whether voluntarily or involuntarily created, except Permitted Liens). The Builder Lenders and the Agent (and all Persons designated by the Builder Lenders or the Agent for the purpose specified in this sentence) hereby are made, constitute, and are appointed as the Trustee's true and lawful attorney and agent-in-fact to execute such security agreements, mortgages, financing statements, documents, and other agreements and instruments and do such other acts and things as may be necessary or appropriate to preserve and perfect the liens of the Builder Lenders and the Agent on the Collateral. A carbon, photographic, photostatic, or other reproduction of the TIP Loan Agreement, this Interim Order, or of a financing statement shall be sufficient as a financing statement.

4. Use of TIP Facility Proceeds and LID Proceeds. Pursuant to and in accordance with the terms and conditions of this Interim Order, the TIP Loan Documents, and in a manner consistent with the Budget (as the same may be modified, supplemented or updated from time to time consistent with the terms and conditions of the TIP Loan Agreement), (a) the Trustee is authorized to use the advances made under the TIP Loan Agreement, and (b) the Trustee is authorized to use the LID Proceeds.

5. Events of Default; Remedies.

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2 (a) Events of Default. The Defaults identified in Section 9 of the TIP Financing
3 Agreement shall constitute Defaults under this Interim Order and the TIP Loan
4 Documents.

5 (b) Rights and Remedies Upon Event of Default. Upon the occurrence of a Default, the
6 Builder Lenders may immediately, upon giving any such notice to the Trustee as may
7 be required under the TIP Loan Agreement, (i) cease to make any Loans under the
8 TIP Loan Agreement or any other Loan Document, (ii) declare all or any portion of
9 the Loans and all other outstanding Obligations to be due and payable immediately,
10 without further order of, or application to, the Court, and without presentment,
11 demand, or protest, all of which are deemed to be waived by the Trustee and (iii)
12 subject to paragraphs 5(c) and 5(d) below, exercise any and all of their other rights
13 and remedies under applicable law (including, but not limited to, the Bankruptcy
14 Code), the TIP Loan Agreement and the other TIP Loan Documents.

15 (c) Relief from Automatic Stay.

16 If a Default occurs (including the failure to pay all Obligations that are due upon
17 maturity), then (i) the Builder Lenders may set an expedited hearing for relief from
18 the automatic stay on not less than three Business Days' notice and at such hearing
19 the only issues will be (x) whether an uncured Default exists, and (y) whether the
20 Bankruptcy Court may impose any condition on the exercise of the Builder Lenders'
21 remedies (which condition the Builder Lenders may oppose), so long as such
22 condition does not delay the Builder Lenders' exercise of remedies for more than 30
23 days and otherwise does not impair the interests of the Builder Lenders in their
24 Collateral; and (ii) consistent with the Court's determination as to "i" immediately
25 above, the Builder Lenders shall be granted relief from stay if an uncured Default is
26 found to exist and the automatic stay provisions of Bankruptcy Code section 362 shall
27 be vacated and modified to the extent necessary to permit the Builder Lenders to

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2 exercise all rights and to effectuate the provisions of the TIP Loan Agreement and
3 this Interim Order, without the need for filing further pleadings or application to or
4 order of the Court.

5 (d) Modification of Automatic Stay. Subject to paragraph 5(c) above,

- 6 (1) the automatic stay provisions of Bankruptcy Code section 362 are hereby
7 vacated and modified to the extent necessary to permit the Builder Lenders to
8 exercise all rights and to effectuate the provisions of the TIP Loan Agreement
9 and this Interim Order, without the need for filing further pleadings or
10 application to or order of the Court; and
- 11 (2) no party in interest shall have the right (i) to contest the enforcement of the
12 remedies set forth in the TIP Loan Agreement on any basis other than the fact
13 that a Default has not occurred or (ii) to seek injunctive relief against such
14 enforcement under Bankruptcy Code section 105 or otherwise, or to seek
15 injunctive relief in conflict with the provisions of the TIP Loan Agreement or
16 the Interim Order.

17 6. Other Rights and Obligations.

18 (a) Good Faith Under Section 364(e) of the Bankruptcy Code; No Modification or
19 Stay of this Interim Order. Based on the findings set forth in this Interim Order and in
20 accordance with section 364(e) of the Bankruptcy Code, which is applicable to the Builder
21 Lenders and the TIP Facility contemplated by this Interim Order, in the event any or all of the
22 provisions of this Interim Order are hereafter modified, amended, reversed or vacated by a
23 subsequent order of this or any other Court, the Builder Lenders are entitled to the protections
24 provided in section 364(e) of the Bankruptcy Code and no such modification, amendment,
25 reversal or vacation shall affect the validity and enforceability of any advances made hereunder
26 or lien or priority authorized or created hereby. Notwithstanding any such modification,
27 amendment, reversal or vacation, any claim granted to the Builder Lenders hereunder arising

1 prior to the effective date of such modification, amendment, reversal or vacation of any TIP
2 Loan Protections granted to the Builder Lenders shall be governed in all respects by the original
3 provisions of this Interim Order, and the Builder Lenders shall be entitled to all of the rights,
4 remedies, privileges and benefits, including the TIP Loan Protections granted herein, with
5 respect to any such claim. Since the advances to be made pursuant to the TIP Loan Agreement
6 will be made in reliance on this Interim Order, the obligations owed the Builder Lenders prior to
7 the effective date of any stay, modification, amendment, reversal or vacation of this Interim
8 Order cannot, as a result of any subsequent order in this Chapter 11 Case, or, following the
9 conversion of the Chapter 11 Case to a case under chapter 7 of the Bankruptcy Code, or
10 following the commencement of any other proceeding superseding the Chapter 11 Case or such
11 chapter 7 case (any such chapter 7 case or superseding proceeding, "Successor Case"), be
12 subordinated, lose their lien priority or superpriority administrative expense claim status, or be
13 deprived of the benefit of the status of the liens and claims granted to the Builder Lenders under
14 this Interim Order and/or the TIP Loan Agreement.

15 (b) Binding Effect. The provisions of this Interim Order shall be binding upon all
16 parties in interest in the Chapter 11 Case, including, without limitation, the Trustee, the Estate,
17 the Debtor, the Builder Lenders, the Agent, the Prepetition Lenders, the City of Henderson, the
18 Indenture Trustee for the bonds issued by the City of Henderson in connection with Local
19 Improvement District T-18, Focus and Meritage and their respective successors and assigns
20 (including any trustee, estate representative or other fiduciary hereinafter appointed as a legal
21 representative of the Estate or with respect to the property of the Estate) whether in the Chapter
22 11 Case, in any Successor Case, or upon dismissal of the Chapter 11 Case or any Successor
23 Case, and shall inure to the benefit of the Estate and the Builder Lenders.

24 (c) No Third Party Rights. Except as explicitly provided for herein, this Interim
25 Order does not create any rights for the benefit of any third party, creditor, equity holder or any
26 direct, indirect, or incidental beneficiary.

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 2 (d) **Amendment.** Except as otherwise provided herein, no waiver, modification, or
 3 amendment of any of the provisions hereof shall be effective unless set forth in writing, signed
 4 by the Trustee, the Builder Lenders, and the Agent and approved by the Court.

5 (e) **Survival of Interim Order.** The provisions of this Interim Order and any actions
 6 taken pursuant hereto shall survive entry of any order that may be entered (1) confirming any
 7 plan of reorganization in the Chapter 11 Case, (2) converting the Chapter 11 Case to a case under
 8 chapter 7 of the Bankruptcy Code, or (3) dismissing the Chapter 11 Case, and the terms and
 9 provisions of this Interim Order as well as the TIP Loan Protections, the Agent's Adequate
 10 Protection Liens and the Adequate Protection Superpriority Claim granted pursuant to this Interim
 11 Order and the TIP Loan Agreement shall continue in full force and effect notwithstanding the
 12 entry of such order, and (x) such TIP Financing Protections shall maintain their priority as
 13 provided by this Interim Order until all the Obligations under the TIP Facility are indefeasibly
 14 paid in full and discharged and (y) the Agent's Adequate Protection Liens and the Adequate
 15 Protection Superpriority Claim shall maintain their priority as provided by this Interim Order
 16 until the Adequate Protection Obligations are indefeasibly paid in full and discharged.

17 (f) **Inconsistency.** In the event of any inconsistency between the terms and
 18 conditions of the TIP Loan Documents and of this Interim Order, the provisions of this Interim
 19 Order shall govern and control.

20 (g) **Waiver of Bankruptcy Rules 4001(a)(3) and 6004(h) Stay.** This Interim Order
 21 shall constitute findings of fact and conclusions of law and shall take effect and be fully
 22 enforceable immediately upon entry, notwithstanding the provisions of Bankruptcy Rule
 23 4001(a)(3) and 6004(h), which, to the extent applicable, are waived and shall not apply to this
 24 Interim Order.

25 (h) **Final Hearing.** The Final Hearing to consider entry of a Final Order and final
 26 approval of the TIP Facility is scheduled for [August ____], 2011 at [_____] at the United States
 27 Bankruptcy Court for the District of Nevada, Las Vegas Division. On or before [July ____],

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2 2011, the Trustee shall serve, by United States mail, first-class postage prepaid, notice of the
3 entry of this Interim Order and of the Final Hearing (the “Final Hearing Notice”), together with
4 copies of this Interim Order, the proposed Final Order and the Motion, on the Notice Parties
5 identified in the Motion. The Final Hearing Notice shall state that any party in interest objecting
6 to the entry of the proposed Final Order shall file written objections with the Clerk of the
7 Bankruptcy Court by no later than [], 2011, which objections shall be served so that
8 the same are received on or before such date by: (i) counsel for the Trustee; (ii) the Office of the
9 United States Trustee; (iii) counsel for the Builder Lenders; (iv) counsel for the Debtor out-of-
10 possession, and (v) counsel for the Agent.

11 (i) The terms and conditions of the Cash Collateral Orders remain in full force and
12 effect, except as expressly modified by this Interim Order.

13 (j) Retention of Jurisdiction. The Court has and will retain jurisdiction to enforce
14 this Interim Order according to its terms.

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